BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JAMES C. BRYANT Claimant	)	
VS.	)	Docket No. 1,017,743
TAP ENTERPRISES, INC., d/b/a **CUMMINS INDUSTRIAL TOOLS** Self-Insured Respondent	)	

ORDER

STATEMENT OF THE CASE

Respondent requested review of the February 18, 2008, Award entered by Administrative Law Judge Thomas Klein. The Board heard oral argument on May 16, 2008. David H. Farris, of Wichita, Kansas, appeared for claimant. John David Jurcyk, of Roeland Park, Kansas, appeared for the self-insured respondent.

The Administrative Law Judge (ALJ) found that claimant met with personal injury by accident arising out of and in the course of his employment with respondent and that claimant gave timely notice of his accident. The ALJ also found the rating opinion of Dr. Pedro Murati to be more credible than that of Dr. Michael Munhall and found that claimant had a 10 percent functional whole person impairment. At the time of the regular hearing, claimant was earning less than 90 percent of his preinjury average weekly wage The ALJ, however, found that claimant was not entitled to a work disability because ". . . [c]laimant voluntarily cut back his hours . . . ."[1] Presumably, the ALJ determined that claimant did not make a good faith effort to work post accident and, therefore, imputed a wage that was at least 90 percent of claimant's preinjury average weekly wage, based upon claimant's wage earning ability. That would give rise to the presumption of no work disability contained in K.S.A. 44-510e.

The Board has considered the record and adopted the stipulations listed in the Award.

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[1] ALJ Award (Feb. 18, 2008) at 3.

ISSUES

Respondent contends that claimant did not meet with personal injury by accident arising out of and in the course of his employment, arguing that claimant's testimony is rebutted by other evidence and should be rejected because it is inconsistent and lacks credibility. Accordingly, respondent requests the Board reverse the Award of the ALJ.

Claimant argues that he is entitled to a work disability but that the ALJ's Award should be affirmed in all other respects.

The issues for the Board's review are: Did claimant suffer personal injury by accident that arose out of and in the course of his employment with respondent? If so, what is the nature and extent of his disability?

FINDINGS OF FACT

Claimant, who lives in Colorado, was employed by respondent as a truck driver and laborer. He was a member of a crew that went from town to town putting on tool shows. The crew would work 14 days and then be off 14 days. On December 19, 2003, claimant was in Dublin, Texas. He testified he was standing on a tire lining up an air compressor to bolt it to the motor block when he slipped off the tire and fell in between the frame of the truck and the tire. He said he fell about five or six feet, injuring his back. When he was asked his opinion as to the cause of his back problem, claimant answered: "From falling off the truck when I was putting the compressor on it."[2] There was no mention of the air compressor falling on him.

Claimant said he reported the accident that day to his supervisor, Rick Buchanan, and that Mr. Buchanan called the home office, but the person who handled workers compensation was out of the office for the Christmas holiday. Claimant said that Mr. Buchanan told him to do no work except to drive the truck on December 20 and December 21, after which the crew returned to Colorado.

On December 31, 2003, claimant, on his own, went to the emergency room in Colorado because his back was hurting. He was seen by a nurse practitioner and said he told her what had happened at work on December 19. According to claimant, the nurse practitioner asked him if anything else had happened other than the accident at work, and he told her that he had been head-butted in the groin by his son. Claimant said he was not hit in the back by his son but was only hit between the legs in the groin area. However, the history recorded in the emergency room records indicates that claimant's back pain began two days earlier but became severe that night. Claimant gave a history that he was wrestling with his nephew and was kneed in the back. However, he said his back hurt

[2] P.H. (Sept. 30, 2004) at 14.

before that injury. Claimant said the history recorded in the emergency room notes is wrong. He admits he told the nurse that he had pain for two days before which began to be severe the night he went to the emergency room. He testified that he did not tell the nurse that he was wrestling with a nephew and kneed in the back.

Claimant has been contacted by respondent about returning to work, but claimant has not answered them. He does not believe he can return to that type of work and stay within his restrictions. On October 9, 2006, he started working for Fowler & Peth, a roofing supply company. He sweeps floors now, where before he was loading and unloading pressure washers and toolboxes from semis every morning and night. He is able to stay within his medical restrictions. He has an understanding with his current employer that if his back starts hurting, he can quit and go home, and sometimes he has done that. As such, even though his hourly rate is $12 for a base and $18 for overtime, he only earns about $340 per week.

Rick Buchanan was sales manager for respondent and was claimant's supervisor. He no longer works for respondent. He hired claimant to drive and act as a crew hand. Claimant was part of a crew of four that included Mr. Buchanan. They would go out for 14 days putting on tool shows and then would travel home. Mr. Buchanan was constantly with the crew when they were on the road. He usually roomed with claimant at the motels. Mr. Buchanan was responsible for maintenance and service of the truck. During the December 2003 trip, claimant indicated that he could work on the truck. Mr. Buchanan attempted to get approval from the home office for claimant to do maintenance on the truck but was told that claimant was not allowed to do it. Mr. Buchanan, therefore, told claimant he was not allowed to work on the truck and arranged for someone to come to the location and do an oil change. Mr. Buchanan testified that claimant did not come up to him and report an accident or injury on December 19, 2003. He never saw claimant working on the truck in any way. He saw claimant standing by the man who was working on the truck, but he thought they were probably just visiting.

Following that alleged date of accident, Mr. Buchanan did not recall claimant having any difficulty with physical activities. December 19, 2003, was the only time he had the truck serviced on the Texas trip. He said that claimant did not attempt to replace a fuel filter during this trip. To Mr. Buchanan's knowledge, claimant was not required to remove the truck's compressor. The only work on the truck Mr. Buchanan saw claimant perform was checking the oil and doing the normal morning walk-around. Mr. Buchanan was neither present at nor advised of any work-related accident involving claimant.

Mr. Buchanan further testified that he did not tell claimant to just drive the truck to the next show and not to do anything else. During the period of time the crew was on the road in Texas, every member of the crew, including claimant, was able to perform his work. Mr. Buchanan was with the crew the entire time, unless he was making bank deposits or going out to pick up lunch. Mr. Buchanan denied that he called the home office to report that claimant had a back injury.

Sometime within two weeks after the trip to Texas, Mr. Buchanan saw claimant in a Wal-Mart, and claimant told him that his back was hurt. Mr. Buchanan could tell that claimant was in pain. At that time, claimant did not say and Mr. Buchanan did not ask how claimant was injured. He asked claimant if he would be able to return to work, and claimant said no. Mr. Buchanan said that claimant had not exhibited any pain symptoms while they were on the road in Texas.

Dr. Robert D. Lins, who specializes in emergency medicine, is employed at St. Thomas More Hospital in Colorado. When Dr. Lins sees a patient, he takes a history of the chief complaint, the history of the complaints, the patient's past medical history and surgical history, does a physical examination, orders any medical tests, and formulates a treatment plan. If a patient complained of back pain, Dr. Lins would do a head-to-toe physical examination. He said that taking an accurate history from a patient is extremely important in deciding a diagnosis or treatment plan.

Dr. Lins saw claimant at the emergency room on December 31, 2003. Claimant's chief complaint was low back pain that radiated down his leg and increasing frequency of urination. The emergency room notes indicated that claimant was guarding his gait. Claimant said he had a past medical history of arthritis of the spine, diabetes, and stroke. He told the nurse he had no acute injury, and there was no obvious deformity.

Claimant told Dr. Lins that his pain had begun two days earlier but had become severe that night. He told Dr. Lins he had no history of back pain and that he had been wrestling with his nephew and was kneed in the lower back. However, he had been having some pain before the wrestling incident. Dr. Lins opined that just being kneed in the back would have a low likelihood of causing a disk herniation, but including other factors in wrestling that may have occurred could have contributed to a disk herniation. Dr. Lins did not see any bruises or lacerations on claimant's back. Claimant did not tell him that he hurt his back at work or that he fell 5 to 6 feet off a tire, landing on his back, on or about December 19, 2003. Neither did claimant say he had been head-butted by his eight-month-old son. Dr. Lins did not think that being head-butted by an eight-month-old child while lying on a couch would cause a herniated disk.

Respondent arranged for claimant to be seen by Dr. Joseph McGarry. On January 9, 2004, Richard Straight, a physician's assistant with Dr. McGarry's office, initially examined claimant. When Mr. Straight examined claimant, he took a history. Claimant told him he was lifting an air compressor into the back of a truck and strained his back. Mr. Straight's notes do not indicate that he saw any bruises or lacerations on claimant's back. Claimant did not tell him that he had been kneed in the back while wrestling with his nephew. Nor did he say that he had injured his back when he fell 6 feet off a tire, landing on his back. If any of those comments had been made, Mr. Straight would have documented them in his notes. Claimant testified that he told Mr. Straight that he was lifting an air compressor but not that he was in the back of a truck.

Dr. Joseph McGarry is a board certified family practitioner in Florence, Colorado. Dr. McGarry first examined claimant on January 21, 2004. There is nothing in Dr. McGarry's notes about claimant being kneed in his back while wrestling with his nephew. When he examines a patient, he accurately records the history the patient relates to him and relies on an accurate rendition of that history. The first time Dr. McGarry saw claimant, he reported that he had been leaning over a tire trying to situate a compressor so someone else could bolt it in, and that after being in this position for a prolonged period of time, he experienced pain in his back and legs. Dr. McGarry assumed that claimant was not just bent forward but that some lifting was involved. Dr. McGarry took this history as being essentially the same as when claimant told Mr. Straight that he was lifting an air compressor and strained his back. Claimant did not tell Dr. McGarry that he had slipped and fallen between the truck and the tire, falling 5 to 6 feet and landing on his back. That type of injury would be different than a lifting injury or an injury suffered from being in a prolonged bent position. If claimant later gave a history of a fall causing his injuries, Dr. McGarry would say a logical conclusion would be that Dr. McGarry made a mistake and did not understand what claimant was saying. Dr. McGarry opined that the incident concerning a head butt in the groin did not cause claimant's condition but, instead, claimant's work activities were the probable causative factor.

Although Dr. McGarry had never seen it, if a knee in the back was delivered with enough force and if it caused a person to acutely hyperextend his or her back, it could aggravate existing back pain. But it would require a lot of force. He has nothing in his medical records about claimant being kneed in the back while wrestling.

Dr. McGarry diagnosed claimant with a herniated nucleus pulposus at S1 on the right and a central L3 disk protrusion with spinal stenosis. Claimant has received two epidural steroid injections and has been encouraged to lose weight. He has been on narcotic pain relievers and muscle relaxers.

On October 5, 2006, claimant was seen by Dr. Pedro Murati, who is board certified in physical medicine and rehabilitation, electrodiagnosis, and independent medical evaluations, at the request of claimant's attorney. He related to Dr. Murati that on December 19, 2003, he was changing the fuel filter on a truck and was standing on a tire when his foot slipped. When he started to fall, he grabbed the compressor to prevent himself from falling, but he had already taken the compressor off. When he fell, the compressor landed on the right side of his back. He said his supervisor was present at the time of his injury. He said that three days after his injury, he went to the emergency room, where he received an injection to his low back.

Claimant complained to Dr. Murati that he currently had low back pain which radiated into his buttocks and both legs. His back pain was worse at night and he sleeps poorly due to the pain. The pain in the right leg is worse than his left, and he has numbness and tingling in the right leg, and the right leg goes to sleep if he sits for prolonged periods of time. Claimant also complained of muscle spasms in his low back which radiate into his legs.

In Dr. Murati's recitation of claimant's medical history, he indicates that claimant

> . . . returned to Dr. McGarry for a follow-up visit on 06-28-04 where he was having complaints of testicular pain. Dr. McGarry diagnosed the patient with testicular trauma which was caused when he was lying on a couch and was head butted by a child in the testicular area.[3]

Dr. Murati diagnosed claimant with a herniated disk at L4-5, low back pain secondary radiculopathy, and right sacroiliac joint dysfunction. He opined that claimant's condition was related to his work injuries of December 19, 2003. Based on the AMA *Guides*,[4] Dr. Murati rated claimant as having a 10 percent diagnosis related estimate Category III impairment to the body as a whole.

Dr. Murati placed restrictions on claimant of no lifting, carrying, pushing or pulling greater than 35 pounds. He could occasionally lift, carry, push or pull to 35 pounds. Claimant should rarely bend, crouch, stoop or crawl, occasionally sit, climb stairs, climb ladders, squat or drive; he could frequently stand and walk. He can lift, carry, push and pull to 20 pounds frequently. Claimant should alternate sitting, standing and walking. Dr. Murati reviewed a task list prepared by Jerry Hardin. He opined that of the 39 nonduplicated tasks on the list, claimant was unable to perform 31 for a 79 percent task loss.

Dr. Michael Munhall, who is a board certified independent medical examiner, examined claimant on October 5, 2006, the same day claimant saw Dr. Murati, also at the request of claimant's attorney. Claimant described an accident of December 19, 2003, when he was replacing a fuel pump. Claimant had removed the compressor in order to reach the fuel pump. Claimant said he was standing on a truck tire holding the compressor when he slipped off the tire. Claimant fell, landing across the front end of the axle onto his left side. He was between the tire and the tire frame. The compressor, which weighed about 150 pounds, fell, striking his right low back area. Claimant told Dr. Munhall that he lost consciousness. Claimant said he received care at the emergency room two days later. Claimant did not mention to Dr. Munhall an incident where he injured his back wrestling with his nephew.

Claimant's complained to Dr. Munhall of constant residual well-centralized low back pain that extended to his bilateral buttocks, hips, posterior thigh, and calves. He described intermittent right leg numbness and tingling. For six months after the injury, claimant stated he was unable to dress himself and was nearly at bed rest. The pain is constant and is aggravated by standing or walking 20 minutes, sitting 40 minutes, bending and lifting. He

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[3] Murati Depo., Ex. 2 at 2.

[4] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

told Dr. Munhall that he had some improvement but was housebound and on the couch most of the day.

After examination, Dr. Munhall diagnosed claimant with low back and bilateral leg pain. He believed that claimant's subjective complaints were compatible with his objective findings. There was no evidence of symptom magnification. He found that claimant had reached maximum medical improvement but said that claimant's prognosis was poor because after a considerable length of rest, he still presented with low back and right worse than left leg pain.

Based on the AMA *Guides*, Dr. Munhall rated claimant as having a 15 percent whole person permanent partial impairment of function for residual low back and bilateral radicular leg pain. He opined that claimant's condition was caused by the work-related accident he sustained on December 19, 2003.

Dr. Munhall placed restrictions on claimant of permanent modified duty, sedentary only employment, maximum occasional lift, carry, push or pull of 10 pounds, and no repetitive bending, squatting, stooping or trunk rotation. Dr. Munhall reviewed the task list prepared by Jerry Hardin, and of the 39 nonduplicated tasks on the list, claimant was unable to perform 31 for a 79 percent task loss.

Jerry Hardin, a human resources consultant, visited with claimant on December 26, 2006, at the request of claimant's attorney. Together, they compiled a list of 39 nonduplicated tasks claimant had performed in the 15-year period before December 19, 2003.

Claimant told Mr. Hardin that he had been making $800 per week at respondent; that he earned $12 per hour and mileage and worked 60 to 65 hours a week. Claimant said he currently earns $12 per hour and was working from 32 to 40 hours per week. He told Mr. Hardin that he was not working overtime. Mr. Hardin did not ask claimant whether the job tasks he performs now are outside his restrictions. Nor did he ask claimant if his condition caused him to miss any work.

The parties stipulated to a preinjury average weekly wage of $576.66. Mr. Hardin calculated that if claimant had a preinjury average weekly wage of $576.66 and a post-injury wage of $340 (the amount claimant testified he earned at Fowler & Peth), claimant would have a wage loss of 41 percent.

The parties also stipulated into evidence claimant's payroll stubs from Fowler & Peth for the period from January 1, 2007, through April 22, 2007. We note that three weeks' of payroll stubs are not included in these stipulated records. Claimant began working for Fowler & Peth on October 9, 2006, and earned $12 per hour. The payroll stubs show that claimant worked 66.55 hours overtime during the period from January 1, 2007, through April 22, 2007, and earned $18 per hour overtime. Claimant did not always work 40 hours.

However, he testified that he at times left work when his back started hurting. He also testified that he missed work after the death of one of his children.

PRINCIPLES OF LAW

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[5] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[6]

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[7]

K.S.A. 2007 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2007 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

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[5] K.S.A. 2005 Supp. 44-501(a).

[6] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995).

[7] *Id.* at 278.

ANALYSIS

Claimant testified that he injured his back on December 19, 2003, when he was lining up an air compressor to bolt it on to a motor block and he slipped, falling five or six feet to the ground. He never testified that the compressor landed on him.

The December 31, 2003, emergency room records contain a history of back pain for two days but becoming severe that night. Those records also reflect that claimant said he was wrestling with his nephew and was kneed in the back, although his back had already been hurting before this incident. According to the hospital emergency room records and Dr. Lins, claimant made no mention of a work-related accident or of falling five to six feet from a truck. There was also no mention of an air compressor falling on claimant.

On January 9, 2004, claimant described his back injury as having occurred by lifting an air compressor. There is no mention of falling five or six feet in Dr. McGarry's office records, nor is there any mention of his being kneed in the back by his nephew. On January 21, 2004, claimant told Dr. McGarry that his injury occurred from leaning over a tire trying to situate a compressor so someone else could bolt it in.

On October 5, 2006, claimant told Dr. Murati that he fell from a truck and an air compressor landed on top of him. Dr. Murati also had a history of claimant being head-butted in the groin by a child.

Claimant told Dr. Munhall on October 5, 2006, that he fell between the truck tire and axle and a 150-pound compressor landed on his back. There was no mention of a wrestling or head-butting incident.

The Board does not find claimant's testimony to be credible. The medical records contain different histories of how claimant injured his back. Likewise, claimant's testimony as to how he injured his back is not consistent with the medical records. Furthermore, his testimony is directly contradicted by his supervisor, Mr. Buchanan.

Mr. Buchanan denies that claimant reported an accident or injury to him on December 19, 2003, denies calling the home office for claimant to report a work-related injury, denies telling claimant to take it easy and just drive and not do anything else, and denies that claimant ever appeared injured during that trip. In addition, claimant had been instructed not to perform maintenance on the truck, and he never saw claimant working on the truck. Mr. Buchanan was with claimant much of the time during that trip and was even claimant's roommate at the motel where they stayed. So he was in a position to observe if claimant was injured. Furthermore, he was available for claimant to report any injury to him. At the time Mr. Buchanan testified, he was no longer employed by respondent and the record does not indicate that he had any ties to that company. The Board finds Mr. Buchanan's testimony to be credible.

CONCLUSION

The Board finds claimant has failed to prove that his accident arose out of and in the course of his employment with respondent. An award of workers compensation benefits is denied.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Thomas Klein dated February 18, 2008, is reversed.

IT IS SO ORDERED.

Dated this _____ day of May, 2008.

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BOARD MEMBER

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BOARD MEMBER

_____
BOARD MEMBER

c: David H. Farris, Attorney for Claimant
John David Jurcyk, Attorney for Self-Insured Respondent
Thomas Klein, Administrative Law Judge